

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE,  
AT NASHVILLE-DIVISION I

STATE OF TENNESSEE

v.

PERRY A. MARCH

Case No. 99-B-1290

2/22/06 M-5  
H/13-15-04  
DAVID C. TOLSON CLERK  
FEB 22 2006  
H/10:15

**MOTION TO COMPEL PRODUCTION OF BRADY MATERIAL**

A response to Defendant's Request for discovery was forwarded to counsel for the defense on August 31, 2005. Defendant's Brady Request is set forth in Paragraph 16(i) and requests generally Brady information and specifically "any documentary evidence which is inconsistent with any testimony the state intends to introduce".

Defendant's Brady request will follow in the order corresponding to the states response to discovery.

**CONTRACT TERMS**

1. Included in the State's Response is a Complaint filed by Levine, Mattson, Orr and Geraciotti against Elliot Greenberg, here in and after referred to a LMOG and Greenberg, which contains at paragraph 7 that:

"Under LMOG's legal fee arrangement with Defendants, Defendants would pay LMOG on both an hourly and a contingent bases, with the contingent fee paid to LMOG if Tenn. Mat was sold, or if a leveraged buyout or other successful disposition was accomplished."

Defendant has requested that he be provided a copy (or original for review and copying) of the "LMOG's legal fee arrangement with Defendant [Greenberg]" setting forth the hourly and contingent basis.

The Rule of Professional Conduct, Rule 1.5 (c) specifically provides:

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of litigation, settlement, trial, or appeal; other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and whether there was a recovery, and showing the remittance, if any, to the client and the method of its determination.

A copy of the contingency fee contract is material to the defense in this case as contingency fee arrangements must be in writing to be enforceable. Absent a written contingency fee contract LMOG has no enforceable claim against the funds collected which is material to the Defendant of the case under the present Rule of Professional Conduct 1.5 (c).

Pursuant to D.R. 2-106 in determining the reasonableness of an attorney fee the court should look to the following factors:

1. The time devoted to performing the legal service.
2. The time limitations imposed by the circumstances.
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The experience, reputation, and ability of the lawyer performing the legal service.

**Connors v. Connors**, 594 S.W.2d 672, 676 (Tenn.1980) (citing Supreme Court Rule 38, Code of Professional Responsibility, D.R. 2-106).

This court ordered on 11/17/05 that the state be given until 12/17/05 (thirty (30) days) to produce any contract of employment between LMOG and Perry March, any contract between LMOG and Paul Eichel or Greenberg. No contract has been produced. Should the State intend to introduce testimony that a contingency fee arrangement is enforceable between

LMOG and Perry March, Eichel or Greenberg it is material to the defense that it be provided evidence required by D.R. 2-106, specifically:

1. The time devoted to performing the legal service.
2. The time limitations imposed by the circumstances.
3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The experience, reputation, and ability of the lawyer performing the legal service.

**Connors v. Connors**, 594 S.W.2d 672, 676 (Tenn. 1980) (citing Supreme Court Rule 38, Code of Professional Responsibility, D.R. 2-106).

The presence of items 1-6 of which constitutes Rule 16 discovery (tangible objects), the absence of which constitutes Brady material in as much as there can be no enforceable contract, contingent or otherwise, without, meeting the requirements of DR-2-106.

The same is true for the alleged contingent contract between LMOG and Eichel or Greenberg. Not only must contract be enforceable pursuant to DR 2-106 there must also be a meeting for the minds.

The State has conceded (by its failure to produce) that there exists no written contract between LMOG, Perry March or Greenberg. Again, the terms of the contract are material to the defense and discoverable under Rule 16 or exculpatory under Brady. Without terms, the contract is unenforceable. What are the terms of this alleged agreement that does not exit in writing? What is the rate? The term?...”allowable expenses”? A contract (even written) which does not include essential terms is unenforceable. **Johnson v. Hunter**, WL 1285886 (2001 Tenn.Ct.App) p. 2 Attached.

The absence of these terms is exculpatory in as much as Perry March may not be



convicted of theft from LMOG of that which LMOG had no legal interest.

### ACCOUNT RECEIVABLES

The State responded on August 31, 2005 to Defendant's Discovery Request for Brady

Material at paragraph 8 as follows:

In accordance with the decision in Brady v. Maryland, 373 U.S. 83 (1963), all items of exculpatory nature, if any there be, will be furnished to defense counsel if and when any such item or information becomes known to the State.

Defense counsel may assume that any specific request which is not answered is either not discoverable or the information requested is not available. The State cannot provide evidence material to the defense or exculpatory to the defendant until such is made known to the State.

This response is based upon information available to the State at this time. If any additional information becomes known to the State, it will be promptly provided to defense counsel.

On November 15, 2005 in response to Defendant's Motion to Compel Discovery the state provided forty-nine (49) pages of billing records. Also included in the November 15, 2005 response was a one (1) page "Transaction Detail by Account" in the name of Perry A. March Escrow Account listing deposits from 10/2/96 through 6/30/98 and a money market account statement ending on 9/30/05, (previously filed under seal attached to Defendant Notice of Filing and Striking of Motion to Compel). The defense relied on the State's assurance that the defense had received: "all existing documentation requested in Defendant's subpoenas served on Michael Geraciotti and Lawrence Levine".

There are billings listed in the 11/15/05 forty-nine (49) page responses which do not correspond to the "Transaction Detail by Account" provided on the same date. The fact that LMOG is holding accounts and accounts receivable belonging to Mr. March (of which he had no knowledge until nine (9) years later) is clearly inconsistent with the State's position that

Mr. March obtained control over currency belonging to LMOG. The State has provided billing records of Mr. March which are not contained in Escrow Records. What is not contained in the forty-nine (49) plus two (2) page response are the complete billing records as was subpoenaed for the hearing of 11/17/05, as set forth specifically below:

**Michael Geraciotti and Lawrence Levine**

1. All accounts receivable billed by Perry March while an attorney at LMOG which are unpaid and outstanding.
2. All accounts receivable billed by Perry March while an attorney at LMOG which were received by LMOG after May of 1996 until the present.
3. The existence of any accounts including location and amount of any funds received by LMOG of which PAM performed services which were paid to LMOG.

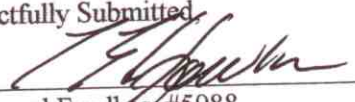
On December 20, 2005 the State forwarded to counsel for the defense, various billing records and work product of Mr. March while at LMOG evidencing that the previous information provided in the States response to discovery dated 8/31/05 and the response to Motion to Compel of 11/15/05 was incomplete. Defendant requests all complete billing records for all clients for whom Mr. March performed services. This request includes not only the time sheets but each individual bill sent to the client, each payment received by LMOG, the split (amount paid to Mr. March and LMOG, all account records for the various clients). The Escrow Account does not reference if the deposits are before or after the split and therefore incomplete. The funds as well as the accounts receivable retained by LMOG is Brady material (LMOG retained control of some clients and their account receivable and Mr. March retained two clients and their account receivable.)


On behalf of Mr. March this office has requested this information from LMOG which has responded by suggesting that this office contact the District Attorney General (Attached

under seal as Exhibit \_\_\_\_). A reasonable attempt has been made to obtain the requested information (once by Request for Discovery, Motion to Compel, Subpoena, then by letter and now by Motion for Brady and to Re-Compel). Mr. March is clearly entitled to his billing and payment records. Absent an agreement (contract) to the contrary, the accounts receivable belong to the attorney handling the case, Mr. March, and are not the property of LMOG.

Defendant further set as cause therefore that upon delivery of the December 20, 2005 fifty one(51) pages of documents, the District Attorney informed this office that it possessed a CD from which the fifty-one (51) pages that were taken as excerpts. This was presumably from Mr. March's computer, referencing his work product and belongs to him and should be made available under Brady as well as Rule 16, tangible object.

Respectfully Submitted,

  
C. Edward Fowlkes, #5988  
LAWYER FOWLKES  
172 Second Avenue North, Suite 210  
Nashville, TN 37201-1908  
(615) 726-0770

  
Michael J. Flanagan, BPRN# 9445  
95 White Bridge Road, Suite 208  
Nashville, Tennessee, 37205  
(615) 356-1580

**Certificate of Service**

I hereby certify that a true and accurate copy of the foregoing Motion was forwarded by U. S. Mail, postage prepaid, **Amy Eisenbeck and Ben Winters**, Assistant District Attorney General, 222 Second Avenue North, Suite 500, Nashville, TN 37201 on this 22 day of February, 2006.

  
C. Edward Fowlkes

THIS MOTION EXPECTS TO BE HEARD ON \_\_\_\_ DAY OF MARCH, 2006 AT \_\_\_\_ .M.